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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 555

C. R. KIRK & COMPANY,

Petitioner,

vs.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

JAMES A. COSGROVE,
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Summary of Argument.

I. Where an issue of fact involving a question of statute construction is fairly joined it is reversible error on the part of the trial court to fail and refuse to make a finding responsive to such issue.

II. The opinion and decision of the court below is in irreconcilable conflict with the legislative history of the Sporting Goods section of the Revenue Act of 1932; the Treasury Department interpretations of the phrase "games and parts of games" as it appeared in the revenue acts of 1917 and 1918; and the true construction placed on that phrase as used in the Revenue Act of 1932 by this Court

in its decision in the case of *Aronson* v. *White* (302 U. S. 16), and followed by the Circuit Courts of Appeals for the Third and Seventh Circuits.

III. Where the trial court makes evidentiary findings relating to a material issue it is reversible error to make an ultimate finding upon the basis of such findings that is wholly inconsistent with and contradictory of those findings.

IV. The ultimate finding by the court below that "The plaintiff passed on to its customers the tax for which it sues in this case" (F. 5, R. 9), is wholly inconsistent with and contradictory of the evidentiary findings that petitioner did not know of the tax at the time the sales price was fixed, made no provision for the passing on to or the collection thereof from its customers and paid the tax out of its general funds.

ARGUMENT.

I.

The court erred in refusing and failing to make a finding responsive to the issue raised by the allegation in the petition that the device herein involved "Was Not Similar to Any of the Articles Enumerated in the Taxing Statute or to Other Articles Commonly and Commercially Known as Sporting Goods".

This allegation (R. 5) raises a material issue and it is reversible error on the part of the trial court in refusing and failing to make a finding responsive to it. *Universal Battery Co.* v. *United States*, 281 U. S. 580, 584; *Bassick Manufacturing Co.* v. *United States*, reported *sub nom Universal Battery Co., supra*, p. 585.

In each of the cases cited the petitioner had alleged that the article involved was not similar to and did not come

within the classification of articles covered by the taxing statute, and were not articles commonly and commercially known as parts or accessories for use in motor vehicles. In each instance this Court said: "This was a material issue, and for failure of the court to make findings responsive to it the judgment should be reversed and the case remanded for definite and complete findings and further proceedings as may be appropriate". It was so ordered (Id. 584, 585).

In the subject case the petitioner alleged that the article involved here is not similar to and does not come within the classification of SPORTING GOODS and is not similar to any of the games or articles enumerated in the taxing statute. Except for the year and section of the taxing statute involved the allegations are identical.

The evidence relied upon by the petitioner here is the testimony of petitioner's Expert Witness Leo J. Lunn, a man 72 years old and who was at the time of testifying, and for 24 years prior thereto, a promoter for A. G. Spalding & Brothers, Wright & Ditson, Spalding Brothers, and their several manufacturing associates (R. 17). This testimony is to the effect that all the articles enumerated in Section 609 of the Revenue Act of 1932, including the games and parts of games included therein, are what are commonly and commercially known to the trade as sporting goods (R. 16, 18, dq. 20; xq. 2; Commissioner's qq. R. 19). The witness further testified that he had never seen a device similar or even vaguely similar to the article here involved on sale or held for sale in any sporting goods or athletic equipment stores during his years of travel and association with the sporting goods industry (R. 16, dq. 21). He was thoroughly familiar with the catalogues of his employers and with those of their principal competitors and had never seen anything similar or even vaguely similar to that device carried in the catalogues of any of them (R. 17, dqq. 22-23).

This witness gave as his expert opinion that this device could not be classified as a game or an instrumentality properly includable in the general trade classification of articles commonly and commercially known as sporting goods (R. 17, dq. 24). This testimony and expert opinion has neither been challenged nor rebutted.

The issue as to the proper classification of the device herein involved was fairly joined in the pleadings and the right of the petitioner to prevail should not be finally determined until the trial court has performed its full judicial duty and made a finding responsive to it and in accordance with the record proof.

II.

A. The opinion and decision of the court below is in irreconcilable conflict with the legislative history of the sporting goods section of the Revenue Act of 1932.

The original of the legislative enactment under which the taxes here involved were assessed and paid is to be found in Section 600, Title VI, of the Revenue Act of 1917, titled War Excise Taxes. (c. 63, 40 Stat. 300, 316, 318.) It was intended as a levy on manufacturers, producers and importers of certain named articles and others coming within the ambit of one of the ten separate commercially known classifications enumerated in the act. One of the classes of articles selected was "athletic and sporting goods, including games". (H. Rep. 45, 65th Cong., 1st Sess., C. B. 1939-1 (Part 2), pp. 52-53). Other classes were automobiles, musical instruments, jewelry, cameras, picture frames, yachts, toilet preparations, proprietary medicines and chewing gum.

The only classification with which we are concerned reads as follows:

Sec. 600. That there shall be levied, assessed, collected and paid * * *

* * * * * * *

(f) Upon all tennis rackets, golf clubs, baseball bats, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker pieces and boards, dice, *games and parts of games*, except playing cards and children's toys and games, sold by the manufacturer, producer, or importer, a tax equivalent to three per centum of the price for which sold: (Italics supplied.)

As originally proposed this section included fishing lines as well as rods and reels and made no exception for children's toys and games. The provision relating to fishing lines was stricken out and the exemption relating to children's toys and games inserted by the Senate and the House receded. (H. Rep. 172, 65th Cong. Sess., C. B. 1939-1 (Part 2) pp. 80-81.)

In the re-enactment of these taxes under Title IX of the Revenue Act of 1918, other classes of articles were added to the taxable list and the sporting goods section enlarged to include the following: tennis nets, racket covers and presses; skates, skis; snowshoes; toboggans; canoe paddles and cushions, polo mallets; baseball gloves, masks, protectors, shoes and uniforms; football helmets, harness, and goals; basketball goals and uniforms; and golf bags. A catch-all phrase was added at the end reading: "and all similar articles commonly and commercially known as sporting goods". (c. 18, 40 Stat. 1057, 1122, 1124.)

Included among the other classes of articles covered by separate sections of the act were *automatic slot-device vending and weighing machines.* (Sec. 900(16); cf. H. Rep. 767, 65th Cong., 2nd Sess., C. B. 1939-1 (Part 2) p. 110). The House bill proposed a tax on bathing suits but the Senate

struck it out and the House receded. It was originally intended to tax duplicating machines, cash registers and adding machines at the same rate as automatic slot-device vending and weighing machines. (id. p. 111.) As finally enacted the tax was made to apply only to vending and weighing machines. (Conf. Rep. 1037, 65th Cong., 3rd Sess., C. B. 1939-1 (Part 2) p. 173.) The Senate proposed the elimination from this classification of the following articles:—skis; toboggans; baseball bats, gloves, masks, protectors, shoes and uniforms, basketball goals and uniforms; baseballs and footballs. (S. Rep. 275, 67th Cong., 1st Sess., C. B. 1939-1 (Part 2) p. 201.) However, the whole of Title IX of the 1918 Act, including the sporting goods section, was expressly repealed by Section 1400 of the 1921 Act. (c. 136, 42 Stat. 227, 321.)

By a separate provision the tax on automatic slot-device vending and weighing machines was re-enacted without change as Section 900(11) of Title IX of the 1921 Act. (c. 136, 42 Stat. 227, 292.)

In drafting the provisions of the 1924 Act the House proposed the repeal of taxes on hunting garments and livery "for the reason the tax on other sporting goods has already been repealed by the Revenue Act of 1921". (H. Rep. 179, 68th Cong., 1st Sess., C. B. 1939-1 (Part 2) p. 248.)

The Senate proposed a revision of the provisions of the existing law relating to automatic slot-device vending and weighing machines by making the tax 10% in all cases where sold, and 10% of the fair market value when operated by the manufacturer for profit. (S. Rep. 398, 68th Cong. 1st Sess. C. B. 1939-1 (Part 2) p. 294.) This provision was rewritten by amendment from the floor of the Senate as Section 600(8) of Title VI of the 1924 Act. As rewritten and enacted it levied a tax on all automatic slot-device machines irrespective of primary purpose, adaptation, or use. This section reads as follows:

> Sec. 600(8). Coin-operated devices, coin-operated machines, and devices and machines operated by any substitute for a coin, 5 per centum; if the manufacturer, producer, or importer of any such device or machine operates it for a profit, he shall pay a tax in respect of each device or machine put into operation equivalent to 5 per centum of its fair market value.

This section was expressly repealed by Section 1200(a) of the 1926 Act (c. 27, 44 Stat. 9, 93-94, 125-127), and has not been re-enacted nor has it been revived in any form by any subsequent legislation up to and including the enactment of the Internal Revenue Code and 1939 and 1940 amendments. The proposed Revenue Act of 1941 proposes a $25.00 a year use tax on Coin-Operated Amusement and Gaming Devices, and a 10% manufacturer's excise tax on Sporting Goods. (H. Rep. 5417, 77th Cong. 1st Sess. Aug. 4, 1941.)

In drafting the provisions of the 1932 Act, the House proposed the resurrection of many of the earlier excise tax provisions including the provisions relating to furs; jewelry; passenger automobiles, trucks, parts and accessories; mechanical refrigerators; *sporting goods and cameras*; firearms and shells; matches; candy; chewing gum; and soft drinks. (H. Rep. 708 and S. Rep. 665, 72nd Cong. 1st Sess. C. B. 1939-1 (Part 2) pp. 463 and 499.)

The Senate later proposed the elimination of many of these classes of articles from the proposed bill, including the proposed tax on "Sporting Goods and Cameras". (Id. p. 497.)

The House proposal for a tax on sporting goods and based on the exact provisions of the 1918 Act was amended in conference to include therein tennis racket frames and strings and football uniforms, and to exclude therefrom canoe cushions and football goals. (Conf. Rep. 1492, 72nd Cong. 1st Sess. C. B. 1939-1 (Part 2), p. 546.) As finally

enacted it appears in the act as Section 609 and is the section under the provisions of which the taxes herein sought to be recovered were assessed and paid. (c. 209, 47 Stat. 169.) It reads as follows:

> Sec. 609. Tax on Sporting Goods
> There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which sold: Tennis rackets, tennis racket frames and strings, nets, racket covers and presses, skates, skis, snowshoes, toboggans, canoe paddles, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, *games and parts of games* (except playing cards and children's toys and games); *and all similar articles commonly and commercially known as sporting goods.* (Italics supplied.)

In addition to the tax on sporting goods many of the so-called "nuisance taxes" of the war and post-war period were revived and some new ones added. However, neither the provisions of the 1918 and 1921 Acts relating to automatic slot-device vending and weighing machines nor the provisions of the 1924 Act relating to all automatic slot-device and coin-operated machines were either proposed for revival or revived. (S. Rep. 665, 72nd Cong. 1st Sess. C. B. 1939-1 (Part 2), pp. 498-500.) Practically all these "nuisance taxes", including the tax on sporting goods, were expressly repealed as of June 30, 1938, by Section 701(d) of the Revenue Act of 1938. (c. 289, 52 Stat. 447, 568.)

In holding the devices herein involved to be taxable as games within the meaning of that term as used in the sporting goods section of the 1932 Act the Commissioner has in

fact and in effect construed that section of the Act to be applicable to all the devices and machines previously and specifically taxed by Section 600(8) of the 1924 Act. The only test applied by the Commissioner is that of diversion, amusement or skill in the operation of the device or machine. The test of whether or not the device or machine is an article "commonly and commercially known as sporting goods" has not been applied by the Commissioner in holding the devices herein involved to be taxable as "games" under the provisions of the pertinent section of the 1932 Act. The court below sustained the Commissioner in this construction of the statute.

Petitioner contends that this construction of the statute is in irreconcilable conflict with the legislative history of the particular section of the taxing statute under the provisions of which these taxes were assessed and collected.

In order for counsel for respondent to prevail in the effort to resist the issuance of the writ in support of which this brief is directed they are of necessity forced to take precisely the same position taken by Government counsel and repudiated by this Court and the Circuit Court of Appeals for the First Circuit in the case of *White* v. *Aronson*, 302 U. S. 16.

The position of the petitioner here is more tenable than the position of the taxpayer in the *Aronson* case, in that this taxpayer has the weight and authority of the legislative history in its favor demonstrating beyond peradventure of doubt that Congress knew of the existence of coin-operated devices and machines of all types as early as 1924, knew how and when to tax them, and had clearly expressed itself as to when and for how long a time they were to be subject to a manufacturer's excise tax, *to wit*, July 2, 1924 to February 26, 1926.

The failure of the Commissioner and the court below to recognize, or recognizing, to ignore, the legislative history

of the pertinent section of the taxing statute herein involved is tantamount to questioning the intent of Congress, or to infer that Congress was lacking in the ability to express its legislative intent by appropriate legislation in the enactment of the Revenue Act of 1932.

Articles of the type herein involved and irrespective of their primary purpose or adaptability for a use other than that for which they were designed and for which they were sold, and irrespective of the name by which one may chose to call them, were specifically and expressly removed from the taxable list by Congress in the repeal of Section 600(8) of the 1924 Act by Section 1200(a) of the 1926 Act. Only Congress could restore them to such list and it has not seen fit to do so.

In brief, the best evidence of the legislative intent to tax coin-operated devices such as those involved in this proceeding is to be found in Section 900(16) of the 1918 Act and Section 900(11) of the 1921 Act levying a tax on automatic slot-device vending and weighing machines, and Section 600(8) of the 1924 Act extending these provisions to cover all coin-operated slot-device machines and devices.

In consideration of all of which it is respectfully submitted that the devices involved in this proceeding were neither "games" nor "sporting goods" within the legislative intent and meaning of Section 609 of the Revenue Act of 1932.

B. The opinion and the decision of the court below is in irreconcilable conflict with the Treasury Department's interpretation of the phrase "Games and Parts of Games" as used in the Revenue Acts of 1917 and 1918.

In interpreting the sporting goods section of the 1917 Act the Treasury Department regarded this section as levying a tax only on the articles enumerated therein and then only when sold in a finished state of manufacture. Sleds, snow-

shoes, skis and skates were held not to be taxable as they were not enumerated in the section. (Art. XVII, Reg. 44, Promulgated 5/31/18.)

In this connection it is to be noted particularly that in the re-enactment of this section in the 1918 Act snowshoes, skis and skates were specifically named in association with all the other articles commonly and commercially known as sporting goods, and all of which were and are very definitely associated with the indoor and outdoor games and contests with which the other articles enumerated in the 1917 Act were associated. It is also to be noted in this connection that in the re-enactment of this section in the 1918 Act Congress not only expressly included the articles which the Commissioner and Treasury officials considered as not being taxable but added for the first time the catch-all phrase "and all similar articles commonly and commercially known as sporting goods".

The catch-all phrase was interpreted by the Treasury Department as being intended to "include all articles which bear a like or similar relation to any game or sport in which they are employed" but not to cover athletic equipment such as gymnasium and playground apparatus. Articles not primarily adapted for use as implements in the playing of either a game or a sport were also held to be exempt, as were articles specially adapted for use in the playing of a game or sport, if commercially sold for general use. (Art. 18, Reg. 47, Promulgated 5/1/19.)

Automatic machines used for both vending and weighing were held to be taxable at the maximum rate as weighing machines under Section 900(16) of the 1918 Act. (Art. 28, Reg. 47.) This provision was carried forward into the revised issue of Regulations 47, promulgated January 6, 1922, under Section 900 of the 1921 Act. (Art. 23.)

The article of the regulations promulgated under the 1921 Act, relating to coin-operated vending and weighing ma-

chines, was revised to conform to the provisions of the 1924 Act levying a tax on all coin-operated devices. It read as follows:

> "Art. 21. Coin Operated Devices and Machines:
> The tax applies to all machines and devices operated by a coin. The following named are examples of such machines and devices: Vending machines, weighing machines, gambling machines, coin-operated devices used in telephone pay stations, coin-controlled locks, shoe shining machines, coin-operated devices controlling 'automats', etc. * * * Machines operated by hand lever released by dropping a coin or any substitute therefor are taxable". (Reg. 47, Revised 8/20/24.)

In promulgating the regulations issued under the 1932 Act the Treasury Department treated the "Sporting Goods" section as divisible into two separate and distinct classifications, namely, "Sporting Goods" and "Games". (Art. 53-55, Reg. 46, Promulgated 6/18/32.)

The term "Sporting Goods" was interpreted as applying to "all articles of the same general character as those specifically named, the purpose of which is primarily for use either indoors or outdoors in connection with a game or sport". The term "Game" was interpreted as applying to "games of skill or chance, and every contrivance, device, or combination of articles which is designed to furnish sport, recreation, or amusement" (Art. 53).

As illustrative of the type of articles deemed to be subject to the tax as "Sporting Goods" the regulations list "all paraphernalia, equipment, and uniforms especially designed for or commonly used in *athletic contests*, archery, baseball, football, basketball, cricket, curling, and similar games or contests, canoeing, bowling, non-commercial fishing, * * * fencing, tennis, golf, boxing, etc." (Art. 54, italics ours). As to the type of articles deemed to be subject to the tax as "Games" they list "dice, chess and

checker sets, ping-pong sets, roulette wheels, backgammon sets, etc." (Art. 55).

Athletic equipment designed for use in gymnasiums and on playgrounds the primary purpose of which is to furnish sport, recreation, and amusement or some combination thereof, were regarded as not being taxable either as "sporting goods" or "games". As illustrative of the type of articles thus exempted was listed "rowing machines, trapeze rings, punching bags, dumb-bells, indian clubs, parallel bars, and similar articles" (Art. 56).

It is to be particularly noted that only games and instrumentalities primarily adapted for use in a game or sport involving the element of physical or mental contest between two or more persons are listed as taxable whether it be in the classification of "Sporting Goods" or "Games", with two possible exceptions, namely, equipment especially designed for use in (1) canoeing, and, (2) non-commercial fishing. In this connection it will be further noted that "canoe paddles" and "fishing rods and reels" are specifically named in the section as being taxable, and that Congress specifically eliminated fishing lines from the earlier Act and canoe cushions from this Act.

Further enlightenment as to the Treasury Department's recognition of the legislative intent to levy a tax only on games and paraphernalia, equipment and uniforms especially designed for use in one of the indoor and outdoor sports, games or contests referred to in the Act or similar thereto is to be found in the Bureau rulings in specific cases.

Notwithstanding the broad language of the regulations that all instrumentalities primarily adapted for use in one of the games or sports named in the 1932 Act, it was later specifically held that the Act did not apply to "fishing nets, lines, hooks, baits, flies, etc.", or to "other fishing paraphernalia", all of which are as much or more essential to

the outdoor sport of fishing than the rods and reels enumerated in the Act (S. T. 461; C. B. Dec. 1932, p. 479; 1938 P.-H. ¶ 25,596, 25,596B). See also the ruling as to surf boards and spring boards designed for use in and essential to two of the more exciting and highly competitive outdoor summer sports (1938 P.-H. ¶ 25,596F). See particularly the specific rulings that only those instrumentalities primarily adapted for use in the actual playing of one of the games or contests referred to in the Act were held to be taxable. For example, tennis nets were held to be taxable while tennis back-stop nets were held to be non-taxable; and instrumentalities essential to the playing of the game of baseball were held to be taxable while baseball batting cages used only in practice were held to be non-taxable; instrumentalities essential to the playing of the game of golf were held to be taxable while golf practice nets were held to be non-taxable (Letter to The Linen Thread Company, Inc., Feb. 22, 1935; 1938 P.-H. ¶ 25,596G).

Whether viewed in the light of the plain provisions of the statute or the Treasury regulations and rulings, the coin-operated devices herein involved were neither games nor instrumentalities adapted for use in the playing of any of the games or contests enumerated in the Act, nor were they articles or instrumentalities commonly or commercially known as sporting goods. As specifically found by the court below these devices "could be operated by only one person at a time" (F. 2, R. 8). As clearly established by the record proof they were not devices that would be properly included among the instrumentalities for playing games ordinarily sold by establishments specializing in the sale of sporting goods and athletic equipment and in general were dissimilar to such instrumentalities, as well as to the instrumentalities for playing games or contests specifically named in Section 609 of the Revenue Act of 1932.

They were, in every sense of the word, similar to the vending and weighing machines and the many other types of coin-operated devices covered by Section 600(8) of the Revenue Act of 1924, which was repealed by Section 1200(a) of the Revenue Act of 1926. As will be noted from the findings of the court below these machines were designed and used only for the purpose of affording an opportunity for the *individual* test of skill and the vending of the amusement incident thereto. There were no rules issued governing the manner in which they were to be used; there were no prizes, awards or inducements to encourage their use for any purpose; and "no payout device was provided on the machines". The coin mechanism was not essential to the operation of the machine and was provided only for the purpose of collecting the rental by the owner for the use of the machine by the individual operator. The petitioner here was the manufacturer and sold the machines outright retaining no interest either in the machine or the operating revenue (F. 2-3, R. 8-9).

Unless, therefore, it can be said that the legislative intent was to tax any and all devices or contrivances designed to furnish only an opportunity for the *individual* development and test of skill and for amusement it must be conceded that the Treasury regulations interpreting the phrase "games and parts of games" as being applicable to games, contrivances and devices wholly foreign to the field of competitive indoor and outdoor games and sports is an unwarranted enlargement of the legislative enactment and is, of itself, an attempt to legislate by administrative *fiat*.

Shortly after the enactment of the 1932 Act and promulgation of the regulations herein involved the Bureau ruled that coin-operated devices in the operation of which the operator received either merchandise or service were not taxable (St. 480; C. B. Dec. 1932; 1938 P.-H. ¶ 25,603). In

the same ruling it was held that if such a device could be readily converted into a "game of chance" it was taxable under the "Sporting Goods" section. Subsequently, and in March, 1936, the Bureau expanded this ruling to cover all coin-operated vending devices in the operation of which there was the element of skill, *recreation or amusement.* In view of the prior and inconsistent rulings as to this type of device this ruling was made prospective and without retroactive effect as to sales made in reliance upon prior rulings (G. C. M. 16,347; C. B. June, 1936, p. 397; 1938 P.-H. ¶ 25,602A). By this ruling the incidental elements of *recreation or amusement* alone became the sole test of taxability of coin-operated machines and devices under the "games and parts of games" phrase of the sporting goods section. Under this interpretation the major elements of original design and primary adaptation were disregarded. Devices designed and primarily adapted for vending merchandise or service with an amusement feature as an inducement for further and repeated use or as a trade stimulant, as well as devices with the amusement feature alone, were held to be taxable as games, but only on and after March, 1936.

An executive officer cannot write into a statute something which is not there and a regulation which, in effect, attempts to do so is nothing more than the expression of an opinion by an administrative officer. Where there is some doubt as to the legislative intent or ambiguity in the statutory provision the regulation of an administrative officer may be referred to under the general rule applicable to statute construction, but where, as here, the plain intent of the regulation is to revive the provisions of an earlier act that had been expressly repealed by the legislature it is an unwarranted abuse of administrative authority and wholly without force or effect.

C. The opinion and decision of the court below is in irreconcilable conflict with the true construction placed on the phrase "Games and Parts of Games", as used in the Revenue Act of 1932 by this Court and followed by the Circuit Courts of Appeal for the Third and Seventh Circuits.

There are two informative Court decisions rendered in cases arising under the Sporting Goods section of the 1918 Act which have a bearing on the primary question involved in this proceeding. One is the decision of the Circuit Court of Appeals for the Fourth Circuit in *Baltimore Talking Board Co.* v. *Miles*, 280 Fed. 658. The other is the decision of the Court of Claims in *Mills Novelty Co.* v. *United States*, 72 Ct. Cls. 433.

In the *Talking Board* case the devices involved were Ouija boards and in the *Mills* case they were gambling machines.

In the *Talking Board* case the Circuit Court affirmed the ultimate finding by the trial court that a Ouija board was a game within the meaning of the Act on the basis of the evidentiary findings this device was "generally used as a means of amusement" and "the Patent Office issued a patent describing it as a game" (Ibid. 661-662).

In the *Mills* case the Court of Claims held a gambling machine to be a game within the meaning of the Act on the grounds that (1) the phrase "games and parts of games" was intended by Congress "as a sort of 'catch-all' or 'basket clause', that is, it was intended to catch and bring within the revenue net all kinds of articles used in playing games whether they are included in the list that preceded it or not", and, (2) the device was primarily adapted for use as a game of contest between the operator and the owner of the machine.

There was a dissenting opinion in each of those cases. In the *Talking Board* case Knapp, Circuit Judge, expressed the opinion that the doctrine of *ejusdem generis* applied and

the phrase "games and parts of games" was intended to cover only "articles commonly and commercially known as sporting goods or goods sold in sporting goods houses" (Ibid 662).

In the *Mills* case the late Judge Williams expressed the opinion that the doctrine of *ejusdem generis* applied and the "generalizing phrase 'games and parts of games' following an enumeration of specific articles can include only within its meaning like articles to those enumerated". He was further of the opinion that this phrase "must be construed in connection with the phrase which follows, 'and all similar articles commonly and commercially known as sporting goods'," and concluded "No articles other than those specifically enumerated in the Act is subject to the tax, unless such article is of a similar kind to those named and is one commonly and commercially known as 'Sporting Goods'."

These decisions were rendered on February 9, 1922, and on June 1, 1931, respectively. While it may be argued that these decisions probably influenced the Treasury Department in drafting its regulations under the 1932 Act, they do not explain away the failure of the Treasury Department and the Bureau to expand the publicized rulings to cover so wide a field until March, 1936, nearly four years after the passage of the 1932 Act.

Be that as it may, the decision of this Court in the *White* v. *Aronson* case (302 U. S. 16) is authoritative and decisive of the precise question involved there as here and is conclusive as to the meaning and construction to be placed on the phrase "games and parts of games" as used in the particular section of the 1932 Act here involved.

The *Aronson* case involved the question of whether jigsaw puzzles of more than fifty (50) pieces were games within the meaning of the Act. The trial court accepted the Treasury Department's definition of a game under

the 1932 Act as being any contrivance or device designed to furnish recreation, sport or amusement and found for the defendant (13 F. Supp. 913). Upon appeal the Circuit Court of Appeals for the First Circuit reversed the trial court and in so doing stated:

> "* * * the question of construction is whether the articles or instrumentalities intended to be covered by the phrase 'games and parts of games' mean articles or instrumentalities used in games of contest like the specific articles previously named in the section which are used in games of tennis, polo, baseball, etc., all of which involve a contest.
>
> "We think this question requires an affirmative answer and that the words 'games and parts of games' bring into the list of taxables only such other articles as are used in games of contest, the same as those particularly named are and with which they are closely associated" (87 F. (2d) 272, 273).

The construction placed on this phrase as used in the 1918 Act by the Circuit Court in the *Talking Board* case was directly criticized and referred to as being "too broad". The Court was also of the opinion that the proper construction of the phrase "games and parts of games" was to restrict it to the character of the games previously alluded to in the section which were all games of sport involving mental or physical contest and requiring two or more participants or contestants (p. 274).

The decision of the Court of Claims in the *Mills* case was presumed to have been based on the factual finding that the gambling machine was primarily designed and adapted for use only in a game of contest between the owner of the machine and the operator as the participants or contestants.

In affirming the decision of the Circuit Court this Court considered the conflicting constructions placed on the phrase

"games and parts of games" by the majority and minority opinions in the earlier cases and very definitely and positively adopted the reasoning of Knapp, Circuit Judge, and Williams, Judge, in the *Talking Board* and *Mills* cases, and the reasoning and language of the Circuit Court in the *Aronson* case then under consideration (302 U. S. 16).

In the final analysis and by way of repudiating the construction placed on that phrase in the majority opinions this Court stated the problem to be one that did not "rest upon an exception to the general rule but upon the construction of the general language found in the Act". The direct and positive answer to this problem is short, plain and decisive of the issue here. It is as follows:

> "The Circuit Court of Appeals rightfully concluded that: 'The words "games and parts of games" bring into the list of taxables only such other articles as are used in games of contest, the same as those particularly named are and with which they are closely associated.
>
> "Certainly we cannot say that this construction was clearly erroneous. Other judges had accepted it" (p. 20).

In conclusion the Court reiterated the well established rule of statute construction in the following terms:

> "Where there is a reasonable doubt as to the meaning of a taxing act it should be construed most favorably to the taxpayer. Gould *v.* Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211."
>
> "Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them'. Philadelphia Storage Battery Co. *v.* Lederer, 21 F. (2d) 320, 321, 322" (p. 20).

The Bureau's construction of the statute as applying to any and all coin-operated devices having an amusement feature, and the prior decision of the Circuit Court in the *Talking Board* case to the same effect were very definitely

and positively repudiated. This portion of the decision is directed particularly to the decision of the Circuit Court which, to all intents and purposes, was predicated on the evidentiary factual findings that the use of the device afforded amusement and had been described as a game in the patent application. The language of this Court in repudiating that construction is pointed and very expressive. It is as follows:

> "If the opinion construes the statute as embracing all instrumentalities, not necessary for comfort, whose chief use is to afford amusement and diversion, it is obviously too broad" (p. 21).

The rule of statute construction followed in that case is one of long standing and is amply supported by an overwhelming weight of authority. The leading and authoritative decisions in which this rule has been recognized and applied are to be found in the comparatively recent decision of the Circuit Court of Appeals for the Ninth Circuit in *Carter* v. *Liquid Carbonic Pacific Company*, 97 F. (2d) 1, involving a manufacturer's excise tax levied on the sale of carbonated beverages under Section 615 of the 1932 Act. Substituting the term "Sporting Goods" for the term "Carbonated Beverages" the pertinent portions of the decision read as follows:

> "• • •, in the construction of a statute the duty of the Courts is to ascertain the legislative intent 'not by taking the word or clause in question from its setting and viewing it apart', but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will". Helvering *v.* Stockholms Enskilda Bank, 293 U. S. 84, 93, 55 S. Ct. 50, 79 L. Ed. 211.
>
> • • • • • • •

"Since we are dealing with a tax which is directed at a particular industry, this definite proof of a trade usage as to the term *'Sporting Goods'* calls into application the familiar rule that commercial and trade terms having a uniform and definite meaning in commerce and trade will be interpreted accordingly". (Italics substituted.) As said in O'Hara *v.* Lucknecack S. S. Co., 269 U. S. 364, 371, 46 S. Ct. 157, 160, 70 L. Ed. 313.

"* * *, if the act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words".

"This rule does not become inapplicable because the term in question has a general meaning, as understood by society at large as well as a special trade significance. Hedden *v.* Richard, 149 U. S. 346, 13 S. Ct. 891, 892, 37 L. Ed. 763; * * *" (p. 3).

There are three comparatively recent decisions in which the construction placed on the phrase "games and parts of games" by this Court in the *Aronson* case has been applied. The opinion and decision below in the subject case is in irreconcilable conflict with those decisions. In one it was held that bowling alleys constructed on the premises of the customer, as distinguished from the balls and pins, were not taxable as instrumentalities for use in the playing of the game of bowling. *The Brunswick-Balke-Collender Co.* v. *Harrison* (C. C. A. 7th), 116 F. (2d) 786.

In that case the court held that bowling alleys as purchased from the manufacturer and installed on the premises of the purchaser were "not similar to the articles named in the statute or to articles commonly and commercially known as sporting goods" (p. 789), hence, were not taxable under

the Sporting Goods section of the 1932 Act. And this notwithstanding the undeniable fact that they are essential to and a necessary part of the game of bowling when played indoors.

In the other cases the articles involved were flags manufactured and sold for use in marking the holes on a golf course. In each of those cases the trial court held that the flags were part of the ground equipment, as distinguished from the instrumentalities enumerated in the Act and actually used by the individual contestants in playing the game of golf, and therefore, were not taxable either as sporting goods or instrumentalities for the playing of the game of golf. *Chicago Flag & Decorating Co.* v. *United States* (D. C. Ill.), —Fed. Supp. —, 1940 P-H ¶ 62,642; *Darby & Son, Inc.* v. *Rothensies* (D. C. Pa.), — Fed. Supp. —, 1940 P-H ¶ 62,735.

The decision of the trial court in each of those cases was reversed on appeal to the Circuit Court of Appeals for the respective circuits. In reversing the lower courts each of the Circuit Courts adopted and applied the rule of construction supplied by this Court in the *Aronson* case.

These decisions are to the effect that on the facts these flags were designed and intended for use in the playing of the game of golf, they were "parts" of that game and further, "were articles commonly and commercially known as sporting goods". *Chicago Flag & Decorating Co.* v. *United States* (C. C. A. 7th), 119 F. (2d) 413; *Darby & Son, Inc.* v. *Rothensies* (C. C. A. 3rd), 116 F. (2d) 268, certiorari denied 61 S. Ct. 836.

In the case at bar the findings of the trial court and the evidence of record with respect to the issue on which the court below failed and refused to make a definite finding, proves conclusively that the articles here involved were neither games nor instrumentalities for use in the playing of any of the games enumerated or alluded to in the Act

and, further, were not articles commonly and commercially known as sporting goods (R. 13-19).

In these well reasoned opinions just referred to, two against and one in favor of the taxpayer, the construction of the same phrase of the same section of the same Act involved here was under review, and the decision of this Court in the *Aronson* case was relied upon as the guide to the proper construction to be placed on this particular phrase and section of the taxing statute.

In each of those cases the court very definitely and very positively met the issue and construed the phrase "games and parts of games" as being limited in its application by the catch-all phrase "and all similar articles commonly and commercially known as sporting goods". This construction is in absolute accord with the plain provisions of the statute and the decision of this Court in the *Aronson* case. These decisions, while they may not be cited as controlling on the Court of Claims, were informative and, to the extent they are in accord with the *Aronson* decision, should have been followed. They are decidedly indicative of the error of omission on the part of the court below in failing to make a finding responsive to the underlying and primary issue involved.

The court below made the specific finding:

> "The machine could be operated by only one person at a time. It was sometimes used by a single player to test his skill, and it was often used by players alternately in competition against one another to see who could secure the highest score. The parties could or could not, as they chose, place wagers on the outcome." (F. 2, R. 8).

The inference is plain and the evidence supports it that the only way these articles could be used by ~~more than~~ two or more persons and for a purpose other than that for which they were primarily adopted was by the voluntary combined

and co-operative efforts of such individuals according to their own standards. In this respect they are similar to a coin when used in a contest of skill or for amusement, or both, or for gambling such as in pitching to the line; gymnasium weights when used in a contest of strength; spring boards when used in diving contests; fishing tackle when used in fly-casting contests; etc., all of which can be and are used in some form of contest, according to the standards agreed upon by the contestants, and may be for fun, money, or marbles. As pointed out above, gymnasium equipment, spring boards and fishing tackle were held by the Commissioner not to be taxable notwithstanding their adaptability for use in contests of skill or for amusement, with or without the gambling element. Resorting to adaptability for use in such contests as the sole test of taxability all of these articles, including coins, would of necessity be within the broad construction placed on the phrase "games and parts of games" by the Commissioner, the Bureau officials and the court below.

In the final analysis the devices herein mentioned were not "games" within the meaning of that term as used in the 1932 Act, whether viewed in the light of the statutory provisions or the juridical construction placed on the phrase "games and parts of games" by this Court in the *Aronson* case. They were held to be taxable by the Commissioner and the court solely because they were coin-operated devices, which by reason of their particular nature and by some stretch of the imagination might be said to fall within one of the 27 or more dictionary definitions of the word "game".

At page 6 of the opinion the court below stated: "It served no other useful purpose. *It improved neither the mind nor the body.* It had no utilitarian use" (R. 12, italics supplied). This being true how can it be reasonably concluded that the device was similar to the articles of

sporting goods or games, "the same as those named (in the taxing act) are," or that they are "closely associated" with such articles? The term "sport" connotes competition for the purpose of improving the mind or the body or both. The implied major premise is correct but seems to have been lost sight of in the process of reasoning to an illogical conclusion.

III & IV.

The court below erred in making the ultimate finding that the petitioner passed on to its customers the tax for which it had made no provision for the passing on to or the collection thereof from its customers, and which it paid out of its general funds.

The argument here advanced relates to the secondary issue of fact involved in this proceeding, namely, whether or not the petitioner below established by reasonable and substantial proof that it "has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of the tax from the vendee". (Sec. 621(d) Revenue Act of 1932.)

The section of the taxing statute giving rise to the issue, insofar as it is pertinent here, reads as follows:

> "Sec. 621. CREDITS AND REFUNDS.
>
> (d) No overpayment of tax under this title shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included in the price of the article with respect to which it was imposed, or collected the amount of the tax from the vendee, or, (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written

consent of such ultimate purchaser to the allowance of the credit or refund".

The petitioner here conceded that it had made no tender of proof under the second correlative provision of this section of the Act. The issue therefore went only to the sufficiency of the proof submitted in support of the contention that the tax was neither included in the price at which the devices were sold nor collected from the vendees.

The pertinent and material findings of the Court below relating to this issue appear in findings numbered 3, 4, 6, 7, and 8 (R. 9-11).

Briefly summarized they are to the effect that petitioner sold its devices during the period February to June 30, 1938, the date of repeal of Sec. 609 of the Revenue Act of 1932. The sales price was fixed by taking into consideration the cost of manufacture, overhead and selling costs, and reasonable profit, together with a consideration of what the machines could be sold for in the then existing market. They were fixed at a time when petitioner was of the opinion that the sales were not taxable and the price was not changed as a result of the demand by the Treasury officials for the payment of the tax. The taxes, penalty and interest assessed were not determined and paid until more than three months after the repeal of the taxing statute, and when paid were paid from the general funds of the company.

Obviously and logically, there is only one conclusion to be reached on the basis of these evidentiary findings, namely, the tax was neither included in the price nor collected from the vendees.

The ultimate finding by the court below that "The plaintiff passed on to its customers the tax for which it sues in this case" (F. 5, R. 9), is wholly inconsistent with the evidentiary findings of its own making and, consequently, is an obvious and reversible error.

This inconsistency was probably due to the admitted failure of the court below to consider this secondary issue. In its opinion the court stated that the view taken with respect to the primary issue, and incidentally, the issue with respect to which it failed and refused to make a responsive finding, "makes it unnecessary for us to consider the second question presented, which is whether or not the plaintiff passed on the tax" (R. 12).

The petitioner was entitled to a full consideration of this issue and an ultimate finding consistent with the evidentiary findings. These findings dictate and compel an ultimate finding that "The petitioner did not include the tax in the price of the article with respect to which it was imposed, or collect the amount of the tax from the vendee."

The only evidentiary findings that might reasonably tend to give rise to contrary ultimate finding are the findings that petitioner used the 1/11 method of computing and paying the tax, and placed the notation "Federal tax paid" or "Federal tax included" on some of the invoices (F. 4, R. 9).

Standing alone and "in the absence of other controlling circumstances" these findings would give rise to the presumption that 10/11s of the sales price represented sales price and 1/11 the excise tax. *Jefferson Electric Co.* v. *United States,* 291 U. S. 386, 81 Ct. Cls. 530.

These findings, however, do not stand alone. They must be considered in the light of the other specific and definite findings that in fixing the price and making the sales no thought was given to the excise tax; that no provision was made for including it in the price or collecting it from the customers; and that the tax was not determined to be due and was not paid until long after the sales had been made at the established sales price and after the repeal of the taxing statute (F. 4, 6, 7 and 8, R. 9-11).

The principle involved in this additional burden of proof imposed on taxpayers seeking a refund of excise taxes erroneously and illegally exacted was first injected into the taxing statutes by Section 424 of the Revenue Act of 1929. (45 Stat. 791, 866.) This was the section involved in the *Jefferson Electric Co.* case, *supra*, and was the forerunner of Section 621(d) of the 1932 Act, the section here involved, and Section 902 of the Revenue Act of 1936, relating to the refund of payments made under the Agricultural Adjustment Act.

The true purpose and intent of Congress in imposing this additional burden of proof on claimants has been duly considered by this Court and numerous lower courts. In every instance the final and authoritative decisions have been to the effect that the facts as to actual passing on to or collection from the customers of the tax were the controlling facts. The persistent practice of Government counsel to rest solely on the proof of bookkeeping entries and invoice notations in the case of excise taxes, and on the statutory presumption in the case of processing taxes, has been in every instance repudiated as unsound and not within the letter or meaning of the statutory provisions.

In the only cases in which this factual issue has been finally resolved in favor of the Government it has been so resolved on the ground that the claimant failed to sustain the burden of proving the tax was neither included in the price nor collected from the customer, or on the ground that the facts showed the sales price had either been set up to include the tax or had been increased by an amount equal to or in excess of the tax which had been paid. *C. M. McClung* v. *United States*, 35 Fed. Supp. 464; *Wm. Filene Sons Co.* v. *White* (D. C. Mass.), 30 Fed. Supp. 415; *Luzier's Inc.* v. *Nee* (CCA 8th), 106 F. (2d) 135; *The Andrew Jergens Co.* v. *Conner* (D. C. Ohio), 31 Fed. Supp. 61.

The contention of Government counsel that the use of the 1/11 method of computing the tax raises a conclusive presumption that the tax was "passed on" was very definitely and very clearly rejected by Judge Chestnut in the case of *Duradene Co.* v. *Magruder* (D. C. Md.), 21 Fed. Supp. 426, 430-431. That opinion is in harmony with the decision of this Court in the *Jefferson* case and decisions of several of the courts adopting and following the rule established by that decision. *Samuel B. Bierman* v. *Shea* (D. C. N. Y.), 28 Fed. Supp. 213; *Con-Rod Exchange, Inc.*, v. *Hendrickson* (D. C. Wash.), 26 Fed. Supp. 679, 682.

Conclusion.

The issues here involved are in reality only two:

1. Are the articles here involved similar to the articles or instrumentalities enumerated in Section 609 of the Revenue Act of 1932, or are they "articles commonly and commercially known as sporting goods" within the meaning of that phrase as used in that section of the taxing statute?

2. Has the petitioner established by reasonable proof that the tax was not included in the price or collected from the vendees?

The petitioner here alleged and proved that the articles, the sales of which were taxed, were not similar to such articles or instrumentalities and were not articles commonly and commercially known as sporting goods (R. 5). The respondent traversed this allegation (R. 7). The court below failed and refused to make a finding responsive to this primary and material issue.

The petitioner prays for an allowance of its application and the issuance of a writ of certiorari to the Court of Claims, and an order reversing and remanding the case to

the Court of Claims with directions to perform its full judicial function by making a finding responsive to this issue consistent with the record proof.

The petitioner alleged, has proved and the court below has specifically found that the taxes herein sought to be recovered were *not included* in the sales price and were *not collected* from the vendees. The ultimate finding of the court below that the petitioner passed these taxes on to its customers is wholly inconsistent with those findings.

The petitioner further prays that the order remanding the case to the Court of Claims include the direction to delete finding 5 of its Special Findings of Fact and adopt in lieu thereof an ultimate finding consistent with the evidentiary findings set forth in findings 3, 4, 6, 7 and 8 of its Special Findings of Fact (R. 9-11).

In consideration of all of which it is respectfully submitted that the petition for certiorari should be allowed and the relief prayed for herein be granted to the petitioner.

Respectfully submitted,

JAMES A. COSGROVE,
Attorney for Petitioner,
National Press Building,
Washington, D. C.

EXHIBIT A.

Request for Findings of Fact.

(Filed December 4, 1940.)

R. 26:

Plaintiff, considering the Report of the Commissioner as a fair and accurate presentation of the material and relevant facts necessary for a proper determination of the issues of fact and law involved in this proceeding requests the Court to adopt the same as its Special Findings of Fact and make them a part of the judgment herein, after incorporating therein, by reference, the exhibits upon which the findings therein recited are based.

The plaintiff requests the Court to make and adopt as its ultimate findings of fact and make them a part of the judgment herein, the following:

R. 27:

1. The device upon the sales of which the taxes, penalty and interest were paid is neither a "game" nor an article "commonly and commercially known as sporting goods" within the meaning of the phrase "games and parts of games * * *; and all similar articles commonly and commercially known as sporting goods" as this phrase is used in Section 609 of the Revenue Act of 1932.

2. The plaintiff did not include the tax, penalty or interest in the price of the article with respect to which they were imposed, or collect the amount thereof from its vendees.

IN THE COURT OF CLAIMS OF THE UNITED STATES.

No. 44807.

(Filed Oct. 21, 1940.)

C. R. KIRK & COMPANY

v.

THE UNITED STATES.

REPORT OF COMMISSIONER.

To the Honorable the Chief Justice and Associate Judges of the Court of Claims of the United States:

Pursuant to the order of reference in the above-entitled case, the following determination and report of the facts is submitted:

1. Plaintiff is an Illinois corporation with its principal place of business in Chicago.

2. During the period involved in this proceeding, plaintiff was engaged in the manufacture and sale of coin-operated machines and person-weighing scales, of which approximately 90 per cent of its total business was in the manufacture and sale of the latter items.

3. One of the coin-operated machines manufactured and sold, and which is the only machine involved in this case, was a "Blow Ball" machine. It was first manufactured in February 1938, and then described as a Blow Ball machine, but shortly thereafter the playing field was changed to make it more attractive. However, the mechanical principles of the machine were not changed. It was thereafter termed "Jig-Saw Blow Ball" machine, but for convenience the machine involved will be hereinafter referred to as a "Blow Ball" machine. A detailed description of the machine is set out in Finding 8.

4. Shortly after plaintiff began the manufacture and sale of the Blow Ball machine, it considered whether such ma-

chines were taxable under section 609 of the Revenue Act of 1932 and reached the conclusion that they were not. However, in order to avoid the imposition of penalties for failure to file a return and upon demand made by a deputy collector of internal revenue, plaintiff, on March 31, 1938, filed a manufacturer's excise tax return for the month of February 1938, reporting a tax due of $1,092.04 on account of sales of the Blow Ball machine. A statement attached to the return read as follows:

> Your taxpayer does not admit that the product manufactured by it is taxable under Section 609 of the Revenue Act of 1932, inasmuch as it is not a game within the meaning thereof, or as defined therein.
>
> The return is filed solely for the purpose of preventing the imposition of penalties in view of the Commissioner's previous ruling on coin-operated devices.

On the same day plaintiff filed a claim for abatement of the entire amount of tax shown on the return together with interest of $1.82, making the total amount of the claim $1,093.86. The basis of the claim was substantially the same as that set out in the statement attached to the return.

5. June 30, 1938, plaintiff filed a manufacturer's excise tax return for the months of March, April, and May, 1938, on account of sales of the Blow Ball machine showing a net tax due of $428.85 after taking certain credits. This return was filed under similar conditions to the filing of the first return and likewise was accompanied by a similar protest. A return for June 1938 was filed in July 1938 showing a credit, on account of returns and allowances in excess of tax due, in the amount of $2.23.

6. August 10, 1938, a deputy collector of internal revenue made a report on plaintiff's excise tax liability for the months of March to June 1938, inclusive, wherein he determined a total tax liability for those months in the amount of $243.31. On the basis of that investigation the deputy collector prepared a corrected return for those months for that tax liability together with penalty of $71.61 and inter-

est of $15.51, which return was filed August 18, 1938. September 19, 1938, plaintiff paid the tax shown due on the foregoing return ($243.31) and at the same time filed a claim for refund of that amount. The principal ground assigned for the claim was—

The article or device manufactured by the taxpayer was not a sporting good or a game within the meaning of either Section 609, or any other definition of the word GAME as found either in the decisions of the various Courts or of the various English and legal dictionaries in use today.

The claim was rejected November 16, 1938, on the ground that the Blow Ball machine is a game within the meaning of section 609 of the revenue act of 1932 and accordingly subject to tax at the rate therein provided; and further, that regardless of the taxability of the items involved, no allowance could be made under the claim for the reason that satisfactory proof had not been presented showing that the taxes involved were not passed on to the ultimate consumer but were assumed by plaintiff at the time of sale.

7. The claim for abatement of the tax for February 1938, referred to in Finding 4, was rejected September 22, 1938. October 14, 1938, plaintiff paid the amount sought to be abated by the claim which, together with interest, amounted to $1,123.54. November 25, 1938, plaintiff filed a claim for refund of the entire amount so paid and assigned grounds therefor similar to those set out in claims heretofore referred to. January 18, 1939, the claim for refund was rejected for reasons similar to those referred to in connection with the rejection of the claim for refund filed September 19, 1938.

8. The Blow Ball machine was a vertical cabinet 15½ inches deep, 24 inches wide, and 74 inches high with a glass panel on the front thereof and a vertical board containing eleven holes surrounded by pins and nails, only nine of which were what might be said to be "active" holes. The other two were nonrecording or "inactive" holes. The holes were all of sufficient size to permit a ping-pong ball, or a ball of similar weight and size, to pass through them. On

the vertical board was a map of the United States divided into nine electrical circuits or sections, one of which was illuminated when the ball passed through one of the nine "active" holes. In order to completely illuminate the map it was necessary for the ball to pass through each one of the nine "active" holes. If the ball passed through any one of the nine "active" holes more than once, no additional illumination of the map occurred. Upon passing through one of the "active" holes, the ball returned to the open space between the glass panel and the board and was available for the same operation. In the back of the board was a motor which could be operated upon the insertion of a coin or a metal disc. It was the usual air current blower type of motor. Upon the insertion of a coin or metal disc, the motor was set in operation ejecting a current of air up and across the face of the board. By moving the control lever back and forth the air current was controlled as to direction propelling the celluloid ball up in back of the glass panel and across the face of the board. The objective of the operator was to direct the ball into the nine "active" holes in order to illuminate the entire map of the United States. When the ball had been directed through one or more of the nine "active" holes nine times, the motor stopped and the ball fell back into the space at the bottom of the cabinet inside the glass panel where it remained until the machine was again set in motion.

The first machines manufactured were equipped with a volume control lever in addition to a lever for control of the direction of air, but this former feature was soon omitted from the machines manufactured and was later removed from those which had been so equipped. The reason for discarding the volume control was that it was found that a machine without such a control thereon was easier and more satisfactory to operate. By taking the volume control off, the machine furnished each player with the same amount of air force behind the ball. The direction control which was left on the machines afforded the operator an opportunity to control to a considerable degree the direction of the ball to a given hole and to develop skill in operating the machine. However, the machine would operate automatically, once it was set in motion, without any direction or control on the

part of an operator, in the event the operator did not exercise any control over the direction of the air current while the machine was in operation.

9. The machine had small rods in front of the holes and each hole had a certain designated score number which showed the score for that hole. The face of the board thus served as a scoreboard. Through the use of the direction control lever, the operator was able to cause the ball to move across the board to and in a desired active hole. Skill could be developed not only in the accuracy of placing the ball in a desired hole through the use of the direction control lever but also in the speed with which that could be accomplished.

10. The machine could be operated by only one person at a time. It was often operated, however, in competition by having one person carry out one or more complete operations and then having another person, or other persons, do likewise and making a comparison of the results accomplished by the several individuals, thus providing a contest of skill or amusement, or both. In a similar manner the machine was used by individuals as an instrumentality for gambling.

11. In advertising the machine plaintiff represented that——

The principal mechanisms of Blow Ball are a blower to furnish the controlled air, a scoring system set-up and the coin mechanism. This makes the game fairly simple in its mechanical construction.

Jig-Saw is the Fastest Game You've Ever Seen—Yet the Skill of the Player is Important.

HIGHER SCORE: Numbers in the Thousands—Just What the Player is Anxious to Have—A High Score.

EASIER TO PLAY: Jig-Saw Does Not Require Tiresome Minutes of Operation But Handles Speedily and Easily.

12. No rules were issued governing the manner in which the machines were to be used by the persons who operated them. Plaintiff offered no prizes, awards, or inducements to encourage the use of the machines. The coin mechanism on the machines, while not necessary to their operation, was

provided for the sole purpose of collecting rental for the use of the machines from those who operated them. No pay-out device was provided on the machines.

13. Plaintiff sold the machines to distributors of coin-operated amusement machines who, in turn, ordinarily sold them to persons who placed them on location for use by the public. Plaintiff sold the machines outright, had no interest in the income from their operation, and placed no restrictions on their use by the ultimate purchaser. The purchaser could use the machines for profit, such as where the coin mechanism was availed of to collect rental; or for his own personal pleasure, when the coin mechanism might be removed; or for such other use as he might desire to make of the machine.

14. The Blow Ball machines were not included among the instrumentalities for playing games ordinarily sold by establishments specializing in the sale of sporting goods and athletic equipment and in general they were dissimilar to such instrumentalities, as well as to the instrumentalities for playing games or contests specifically mentioned in section 609 of the revenue act of 1932.

15. The price at which the machines were sold was fixed by taking into consideration the cost of manufacture, overhead and selling costs, and a reasonable profit, together with a consideration of what the machines could be sold for in competition, that is, what the traffic would bear for that type of machine. The price was fixed at a time when plaintiff was of the opinion that sales of the machine were not subject to the excise tax and the price was not changed as a result of the demand by the collector for the payment of an excise tax thereon.

16. The Blow Ball machines originally sold for $137.50 in February, March, and April 1938, and dropped in price to $85 in May 1938; $50 in June 1938; and $25 in August 1938. The reduction in price was made in order to dispose of the machine which had not proved to be a success from a sales standpoint. Plaintiff sustained a loss during the period of its manufacture of approximately $12,000. Approximately 90 percent of the total sales were made in the months of

February and March 1938. There were no sales after August 1938.

17. In most instances the machines were billed to plaintiff's customers on an invoice which contained the statement "Federal tax paid," although the statement "Federal tax included" appeared on some invoices. The total price appearing on the invoice was the amount collected from the customer.

18. Beginning with the first sale of the Blow Ball machine and continuing throughout the period involved in this suit, plaintiff maintained on its books a "Reserve for Excise Tax" account which was set up in the following manner and can be illustrated by a typical invoice for one machine at the price of $137.50:

On its books the total of that invoice, $137.50, was charged to accounts receivable, and 1/11th of that amount was credited to the Reserve for Excise Tax, and 10/11ths to sales account.

19. In preparing the returns heretofore referred to, plaintiff set up as tax due 1/11th of the total net sales for the periods covered by the returns and the same basis was used by the collector in determining plaintiff's final tax liability.

20. At the time the payments of excise tax which are involved in this proceeding were made, the amount paid was charged to the Reserve for Excise Tax. Due to returns of machines and other adjustments, the reserve for excise tax exceeded the amount finally determined to be due and after final payment had been made the balance in the reserve account was credited to surplus. The excise-tax payments were made from the general funds of the company.

Respectfully submitted.

RICHARD H. AKERS,
Commissioner.

EXHIBIT B.

IN THE COURT OF CLAIMS OF THE UNITED STATES.

No. 44807.

C. R. KIRK & COMPANY

v.

THE UNITED STATES OF AMERICA.

Motion for a Finding Responsive to a Material Issue and for a New Trial.

(Filed May 15, 1941.)

Comes now the plaintiff, by its attorney of record, and moves the Court for a finding responsive to the primary and material issue; to set aside the judgment entered in this cause on April 7, 1941, dismissing plaintiff's petition; and to grant a new trial. In support of this motion the plaintiff advances the following assignments of error:

1. The Court erred in refusing and failing to make a finding responsive to the primary and material issue raised by the allegation that the article on the sales of which the taxes paid "*was not similar in any respect to any of the articles enumerated in the taxing statute or to other articles commonly and commercially known as* SPORTING GOODS" (R. 7).

2. The Court erred in making the ultimate finding that "*the plaintiff passed on to its customers the tax for which it sues in this case*" (F. 5, p. 3).

3. The Court erred in concluding, in its opinion, that "*the device comes within the definition of the word 'game' as used in the act*" (Op. p. 6).

4. The Court erred in refusing and failing to include in its Special Findings of Fact the Report of the Commis-

sioner, more particularly the last sentence of Finding 8 (R. 14-15), and all of Findings 14 and 16 (R. 16), as requested so to do by plaintiff in conformity with Rule 76(a) of the rules of this Court.

Respectfully submitted.

JAMES A. COSGROVE,
Attorney for Plaintiff.

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